FILE COPY

Office-Supreme Court, U.S.
FILED
DEC 20 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

December Term, 1960

No. 592

LOUIS P. HATTEM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. Judgment Sought to Be Reviewed.

RUSSELL E. PARSONS and
IRVING D. APPLE,
448 South Hill Street,
Los Angeles 13, California,
Attorneys for Petitioner, Louis P. Hattem.

The Myers Legal Press, Los Angeles. Phone MA. 5-8820.

SUBJECT INDEX

PAGE

Opinion below 2

Questions presented 3

Statutes involved 3

Statement of the case 4

Specifications of error 5

Reasons relied on for allowance of the writ 6

I.

The court erred in concluding that the petitioner was not entrapped as a matter of law 6

II.

It is our contention that by reason of the incidents related concerning the entrapment of the defendant by the girl, the fact that she told three different stories, two under oath, to the very jury itself. The fact that she was threatened by the Assistant United States Attorney, it is our contention the defendant was denied that fair trial guaranteed to him by the Constitution 7

Summary of the argument 8

Argument 10

I.

The defendant-petitioner, Louis P. Hatten, was entrapped as a matter of law 10

Circuit court decision 15

II.

Petitioner was denied a fair trial 15

Conclusion 19

Appendices:

Appendix I. Opinion of the United States Court of Appeals for the Ninth Circuit ..... App. p. 1

Appendix II. Excerpts from the record concerning the prosecutor becoming distraught ..... App. p. 11

TABLE OF AUTHORITIES CITED

Cases	Page
Jencks v. United States, 353 U. S. 657, 1 L. Ed. 2d 1103	7
Lufty v. United States, 198 F. 2d 760	7
Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158	16
Rochin v. State of California, 342 U. S. 165	16
Sherman v. United States, 78 S. Ct. 820	7, 13
Sorrells v. United States, 287 U. S. 435, 77 L. Ed. 413	7, 13
State v. Grayson, 80 S. E. 2d 387	16
Sunderland v. United States, 19 F. 2d 202	16

Statutes	
United States Code, Title 26, Sec. 4741(a)	3, 4
United States Code Annotated, Title 26, Sec. 4744(a)(1)	2, 3, 4
United States Code Annotated, Title 26, Sec. 7237	2, 3, 4
United States Code, Title 28, Sec. 1254(1)	2

IN THE

Supreme Court of the United States

December Term, 1960

No. .....

LOUIS P. HATTEM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. Judgment Sought to Be Reviewed.

Petitioner, Louis P. Hattem, respectfully petitions for a Writ of Certiorari to review the judgment against him in the United States District Court in and for the Southern District of California, Central Division, and the judgment of affirmation in the Ninth Circuit Court of Appeals. The United States District Court rendered no opinion. The opinion of the Ninth Circuit Court of Appeals is as yet unreported, but a copy is attached hereto in the appendix and is hereby referred to.

The defendant, your petitioner, was charged with a violation of U. S. C. A., Title 26, Sections 4744(a)(1), 7237 (illegal acquisition of marijuana), in Counts One and Two. After a trial by jury, judgment was pronounced sentencing the petitioner to five years in the penitentiary on each count to run concurrently [Clk. Tr. pp. 77-81].

Petitioner filed his Notice of Appeal to the Ninth Circuit Court of Appeals. Thereafter, briefs were filed, and on October 11, 1960, the Court rendered its opinion affirming the judgments appealed from.

Petitioner filed a Petition for Rehearing before the Ninth Circuit Court of Appeals, and hearing was denied on November 21, 1960 (See p. 12, Vol. 9, Record on Appeal).

Jurisdiction to review the judgment in question is conferred upon this Court by 28 U. S. C., Section 1254(1).

Opinion Below.

The District Court rendered its opinion; the trial was by jury.

The Circuit Court rendered its opinion and a copy of the same is attached hereto in the appendix and is hereby respectfully referred to. A copy also appears in Volume 9 of the record, at page 3 thereof.

Questions Presented.

I.

WHETHER OR NOT AS A MATTER OF LAW THE DEFENDANT, YOUR PETITIONER, WAS ENTRAPPED BY OFFICIALS WHO LAID A PLAN TO INDUCE HIM TO COMMIT AN OFFENSE WHICH HE OTHERWISE WOULD NOT HAVE DONE.

II.

WHETHER OR NOT THE DEFENDANT-PETITIONER WAS DENIED A FAIR TRIAL BY REASON OF INCIDENTS OCCURRING THROUGHOUT THE TRIAL. THE INFORMANT WHO WORKED WITH THE OFFICERS IN ENTRAPPING THE DEFENDANT-PETITIONER FIRST TESTIFIED THAT SHE HAD OBTAINED MARIJUANA FROM THE PETITIONER. THEN SHE CHANGED HER STORY UPON THE WITNESS STAND AND SAID SHE HAD NOT, THAT SHE HAD OBTAINED IT OTHERWISE. SHE THEN STATED THAT SHE HAD BEEN THREATENED BY THE UNITED STATES ASSISTANT ATTORNEY WHO WAS IN CHARGE OF THE PROSECUTION.

Statutes Involved.

26 U. S. C., Sections 4744(a)(1), 7237;

26 U. S. C., Section 4741(a);

The text of these statutes are set forth in the appendix to this Petition.

Statement of the Case.

By an Indictment by the United States District Court, for the Southern District of California, Central Division, returned by the Grand Jury in September, 1958, the petitioner was charged with a violation of U. S. C. Title 26, Sections 4744(a)(1), 7237 (illegal acquisition of marijuana), in that in Count One he was charged with on or about June 10, 1958, in the County of Los Angeles, State of California, within the Central Division of the Southern District of California, with having been a transferee required to pay the transfer tax imposed by Section 4741(a), Title 26 U. S. C., knowingly and unlawfully acquired and obtained six marijuana cigarettes without having paid such tax; in Count Two that on or about June 10, 1958, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant, Hattem, being a transferee required to pay the transfer tax imposed by Section 4741(a), Title 26 U. S. C., knowingly and unlawfully acquired and obtained two marijuana cigarettes without having paid such tax [see Clk. Tr. pp. 1-2].

The jury found the petitioner guilty on both counts. The Court sentenced the petitioner for a period of five years on Counts One and Two, the sentences to run concurrently. The Court of Appeals affirmed the judgment.

Specifications of Error.

I.

THE CIRCUIT COURT IS IN ERROR IN CONCLUDING THAT THE DEFENDANT, YOUR PETITIONER, WAS NOT ENTRAPPED AS A MATTER OF LAW. ENTRAPMENT WAS URGED AS A DEFENSE FROM THE BEGINNING OF THE TRIAL.

II.

THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE DEFENDANT WAS NOT DENIED A FAIR TRIAL BY REASON OF THE INCIDENTS WHICH OCCURRED AT THE TRIAL AND TO WHICH OBJECTION WAS APPROPRIATELY MADE, NAMELY, THAT A COMPLAINING WITNESS, KATHY WOLFE, FIRST TESTIFIED THAT SHE OBTAINED THE MARIJUANA FROM A MAN IN A DRUG STORE ON THE SUNSET STRIP. THEN SHE TESTIFIED UNDER OATH AT THE TRIAL THAT SHE HAD OBTAINED THE MARIJUANA FROM THE DEFENDANT-PETITIONER THEREAFTER, SHE CHANGED HER STORY AND SAID SHE HAD NOT OBTAINED THE MARIJUANA FROM THE DEFENDANT-PETITIONER, BUT HAD OBTAINED IT IN LAS VEGAS, NEVADA. THEN SHE TESTIFIED THAT SHE HAD BEEN THREATENED BY THE ASSISTANT UNITED STATES ATTORNEY THEN PROSECUTING THE CASE. THE PROSECUTOR BECAME SO DISTRAUGHT AND UPSET THAT SHE ASKED FOR A RECESS DURING THE COURSE OF THE TRIAL. THE ENTIRE ATMOSPHERE AND CLIMATE AT THE TRIAL BECAME SUCH THAT THE PETITIONER WAS DENIED A FAIR TRIAL.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

The Court Erred in Concluding That the Petitioner Was Not Entrapped as a Matter of Law.

The evidence showed that the defendant had met Kathy Briggs Wolfe at a bar with her mother; that thereafter a friendship developed between them and Kathy Briggs Wolfe, after making a trip to Las Vegas, Nevada, had a purse in her apartment in a hotel owned by Wolfe, who subsequently married her. Wolfe examined the purse, found some marijuana in it, accused the girl of possession thereof, and threatened to call the police unless she did. She had been in trouble with the authorities repeatedly as a juvenile, was thoroughly familiar with marijuana. She called the police; she was booked in Juvenile Hall and subsequently released; a microphone was set up in her apartment, at Wolfe's hotel, and she was told by the officers what to do to attempt to induce Hattem to come to her apartment, even how she should dress, in a negligee, and how she would importune him to come there; she called him some 28 or 30 times. True, she did not reach him each time, but finally she induced him to come to her apartment, notwithstanding he had protested he did not want to talk with her about marijuana. This was corroborated by Wolfe, who listened in on the conversations between she and Hattem. Finally, he came to the apartment, had a small amount of marijuana with him; she was dressed in a negligee;

they had coffee and he rolled a cigarette and smoked the same. We contend that he was entrapped as a matter of law. There is practically no dispute as to the facts surrounding how he was induced to come to the apartment. It is our contention that the decision is in violation of the rule laid down in *Sorrells v. United States*, 287 U. S. 435, 77 L. Ed. 413, reviewed and affirmed in *Sherman v. United States*, 78 S. Ct. Report, No. 14819, at page 820. (See also *Lufty v. United States*, Ninth Circuit, 198 F. 2d 760). It is our contention that the Circuit Court improperly applied the law to the facts in this case. It should have been reversed.

II.

It Is Our Contention That by Reason of the Incidents Related Concerning the Entrapment of the Defendant by the Girl, the Fact That She Told Three Different Stories, Two Under Oath, to the Very Jury Itself. The Fact That She Was Threatened by the Assistant United States Attorney, It Is Our Contention the Defendant Was Denied That Fair Trial Guaranteed to Him by the Constitution.

The opinion of the learned Circuit Court runs counter to the rule laid down in *Jencks v. United States*, 353 U. S. 657, 1 L. Ed. 2d 1103, the effect of which is that "the interest of the United States Government in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Summary of the Argument.

Summarized, the petitioner had met a girl by the name of Kathy Briggs in a bar, had visited with her, talked with her, and this girl asked Hattem to get her some marijuana after she had been found to have marijuana in her purse by her boy friend, Glynn Wolfe. He forced her to call the police. After stating that someone had given her the marijuana whom she could find at a drug store on the Sunset Strip, she said she had obtained the marijuana from the petitioner, Hattem, She had been in difficulties with the Juvenile officers with whom she was well acquainted, having been involved in numerous difficulties and having acquired considerable information about narcotics and its use. Some 28 or 30 phone calls were made to Hattem from her apartment in a hotel owned by Wolfe, her friend, who later married her. She reached Hattem on a few occasions, asked him to bring her some narcotics. Upon one occasion he told her he wanted nothing to do with it; that he had been in trouble before; that if that was all she wanted to talk to him about not to talk to him. This was testified to not only by Hattem but by Wolfe, who cooperated fully with the Government and the police. Hattem testified he had no intention of getting any narcotics or taking it to her until she importuned him to come to her apartment, where he found her dressed in a negligee. The room had been equipped with a microphone; the officers were listening. We assert he was entrapped as a matter of law.

Secondly, we contend that Hattem was denied a fair trial, for during the course of the trial Kathy Briggs changed her story; first she said she had obtained some marijuana from Hattem; then she said she had told the truth, but that the marijuana had been obtained by her in Las Vegas, Nevada. She had talked with Wolfe after she had told the first story and decided that she had better tell the truth, and so changed her story in front of the jury after being recalled as a witness. She then stated that the Deputy United States Attorney had threatened her. She was pregnant by a man other than her husband (Wolfe has since married her), and the prosecutor had told her, "We also put pregnant women in jail." This was done just before she testified. The prosecutor became distraught and upset in Court, as the record shows, and had to ask for a recess. She never once denied the accusation, but presented the evidence of an officer who denied any threat in his presence while the girl talked with the prosecutor. The prosecutor and the girl had become quite good friends. The entire atmosphere and climate created by this incident in the courtroom was such that we contend it was impossible for Hattem to have had a fair trial. The jury was highly prejudiced by reason of this situation.

ARGUMENT.

I.

The Defendant-Petitioner, Louis P. Hattem, Was Entrapped as a Matter of Law.

We have already summarized the evidence and briefly we state that Kathy Briggs was found to have marijuana in her possession by her boy friend, Glynn Wolfe, who subsequently married her, a man somewhat her senior, who owned and operated a hotel in Hollywood in which establishment Kathy Briggs occupied an apartment. She had been to Las Vegas and upon her return the marijuana was found by Wolfe who informed the young lady she would either call the officers or he would call them. She was well-acquainted with the Juvenile Officers, for she had been in trouble with marijuana before and had testified in connection with some alleged assaults by young men. She was thoroughly familiar with the law, well acquainted with marijuana and all of its ramifications. She at first said the marijuana was given to her by a man at a drug store well known on Sunset Boulevard, Hollywood; later, after the officers had talked with her, she said it was given to her by Hattem; she was released from Juvenile Hall, taken to the apartment in Wolfe's hotel, where Wolfe consented to the installation of a recording device in his apartment wi' microphone in the girl's apartment. A plan was laid by the officers; Wolfe described it; so did the officers. There is no dispute about it; they were out to attempt to entrap Hattem and bring him to the apartment and to have him bring some marijuana to the girl. He was called 28 or 30 times by the girl. She only reached him a few times, and upon one of these occasions she wanted him

to bring her something, and Hattem himself told her he wanted nothing to do with it; he had been in trouble before, which he had; he wanted nothing to do with it. This conversation was not denied, and it was overheard by Wolfe. Finally, Hattem came to the girl's apartment, where she was dressed in a negligee; she had even been told by the officers how to dress, in an enticing fashion, and Hattem came to her apartment one morning to have coffee with her at her special invitation. He arrived; he had a small quantity of marijuana with him; some cigarettes were rolled; he smoked one in the bathroom and at about that time the officers broke into the apartment and arrested Hattem. He was plainly entrapped. There is no evidence, we say, that he intended to deal in marijuana or to make any effort to procure it for the girl until finally she induced him so to do.

It is our contention that there is no dispute but that Kathy Briggs, at the direction of the officers, was party to a microphone being installed in her apartment owned by her friend, subsequently her husband, Mr. Wolfe, and that she repeatedly endeavored to get Mr. Hattem to come to her apartment and to bring her some marijuana. There is no dispute over this, and we say that the circumstances permitted of only one reasonable deduction, and that was that Mr. Hattem was induced to get the marijuana, bring it to Kathy Briggs' apartment, and he was thereby entrapped.

It should be borne in mind that Kathy pursued Hattem, even after he had returned from his trip to Lake Mead. She called Hattem and said, "Hi, Louie. This is Kathy. Have you seen that friend of yours?" [Rep. Tr. p. 460]. After Hattem had told her, "Well, Kathy,

I really don't care to get involved in it. You know what my past has been and it would be very foolish of me to do anything like that at this time. I would rather not have anything to do with it. So I suggest very urgently that you talk to somebody else about it. I can't do you any good"; Kathy then replied, "Well, would you please keep trying? If anything does come up, let me know." [Rep. Tr. pp. 460-461]. Again, on June 9, 1958, after a call had been left at his house to call Kathy, Hattem called Kathy and told her:

> "Kathy, please don't be asking me about any marijuana." I said, "If that is the only reason you have for calling me, if we have nothing other to discuss than mar juana, I would prefer if you would forget my number and never call me again. I can't do anything. I don't know where there is any marijuana and I have no idea when I will see any again, so it is futile for you to be asking me for it all the time."
>
> At this point she said, "Well, I am sorry, Louie. Forget I have mentioned it. It has just been that I haven't had any for so long I just wanted some."
>
> I said, "Forget all about it. I don't want to have anything to do with it."
>
> She said, "What are you going to do tomorrow?" I said, "I really don't have anything planned."
>
> She said, "How about coming by about 11 o'clock and waking me up?" She says, "We will have breakfast together." She said, "I will have some coffee and we will have breakfast together."
>
> So I said, "Well, fine. I will see you tomorrow at 11:00."

She said, "Call me just before you come over." I said, "All right, I will call you tomorrow at 11:00" [Rep. Tr. p. 464].

It should be borne in mind that Mr. Glynn Wolfe, who cooperated fully with the Government and who had the extension phone in his apartment so he could listen in on conversations between Kathy and any person outside of the hotel, testified that between the 27th of May and 10th of June, 1958, there was an occasion when he heard Kathy talk to Hattem [Rep. Tr. pp. 396, 397]; that he recognized the voice, that he saw Kathy at the phone; he heard her; he heard her say, "Louie, when are you coming over?" and Louie replied, "Kathy, don't call me any more for this stuff. I can't get any. I don't want any, and if that is all you want out of me don't ever call me again." Kathy then replied, "I'm sorry, Louie," and hung up. This was between May 27th and June 10th [Rep. Tr. p. 397].

It was a plain case of entrapment. This not the case of where a man, ready, willing and able to violate the law, was merely a victim of the officers' having made it possible, he was induced to come to this girl's apartment. She was even dressed for the occasion. There is no dispute about this. This case is a plain case of entrapment, as established in *Sorrells v. United States*, 287 U. S. 435, and as further established in *Sherman v. United States*, 356 U. S. 369, 372 (1957). In the *Sherman* case, as recognized by the learned Circuit Court, in its opinion, page 4 thereof:

"In *Sherman v. United States*, 356 U. S. 369, 372 (1957), the Court described the evil of entrapment, quoting from Sorrels, as follows: '. . .

the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.' The Court then set down the guiding principles to be followed:

> . . . the fact that Government Agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the *creative* activity' of law-enforcement officials. . . . To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal. . . . On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an 'appropriate and searching inquiry into his own conduct and predisposition' as bearing on his claim of innocence" (356 U. S. at 372-3).

It is our contention that the facts in this case show without possibility of any other conclusion that the entrapment occurred only because it was "the product of the *creative* activities—of law enforcement officials." The whole plan was laid out by the officers using Kathy Briggs as a decoy, not to make it possible for a man who was willing to commit an offense so to do, but to induce Hattem against his will by persuasion and enticement to violate the law. Undeniably, he told Kathy Briggs he had been in trouble, he was a fool for even being in her apartment, and finally he consented to come there, where he found her dressed in an appropriate

fashion to entertain him and induce him to violate the law. This case we say must fall. A gross injustice has been done and the learned Circuit Court is in error.

Circuit Court Decision.

The learned Circuit Court, we respectfully urge, is in error when it concludes that this was a matter only for the decision of the jury. As a matter of law, the evidence shows that this man was entrapped. There were no two sides to the question; the evidence plainly shows that he was induced by the importunations of Kathy Briggs, planned, laid out, and perpetrated by the officers. It was not a question of where a man who was willing and ready to commit a crime merely had it made easy for him so to do. He had no intention of violating the law, it reasonably appears. It was a matter of law that this man was entrapped. The learned Circuit Court is in error.

II.

Petitioner Was Denied a Fair Trial.

Next we come to the proposition of whether or not this man had a fair trial and it is our contention that the learned Circuit Court of Appeals is in gross error when it says this man was not denied a fair trial, and that he did have a fair trial. One can search the books and it is difficult to find a case where a witness told a perjured false story and the prosecution did rest upon her testimony. The jury had the testimony of this woman before them, and she changed her story before the jury, not by any inducement on our part, but because she realized that she had done this man a wrong, and she was induced by Wolfe, who informed that she had made a false statement, and so the truth

was brought out, and it appeared that she had testified falsely that Hattem was the man who gave her the marijuana. It was someone else and she so testified.

Then it appears she was threatened by the very prosecutor trying the case. The learned Circuit Court disagrees with our contention, but if one reads the record carefully, one must see what an unfair situation was developed here. The prosecutor never denied the statement of Kathy Briggs that she had been threatened. Surely, the prosecutor could have done so. She used an agent who was present at the conversations, but she herself never denied the situation, and, in fact, she had to ask for a recess in order to recover her composure when she was accused to her face by the witness, Kathy Briggs. This created a situation which the defendant could not possibly hope to meet. It was most unfair and it denied to this defendant that fair trial to which he was entitled under an atmosphere of fairness. The conduct of the witness in this case and the prosecutor shocks one's conscience. (See *Rochin v. State of California*, 342 U. S. 165).

Due process includes the right to a fair and deliberate trial conducted in substantial conformity to law and in an atmospher of calm judicial consideration.

Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158;
State v. Grayson, 80 S. E. 2d 387, 392.

"Fair trial" has been discussed in many texts and, as was said in *Sunderland v. U. S.*, 19 F. 2d 202, 216, where the Eighth Circuit gave considerable attention to whether or not there was a "fair trial," and the Court gathers together a group of assignments of error, and recognized that this group of incidents denied a fair trial. That is our contention here.

The Court had this to say (19 F. 2d 202, at 216):

"While each of the foregoing matters has its own separate status and relative position of importance, yet we have grouped them together, because they all have a bearing upon the broad question whether there was a fair trial. Though the record does not show that any objection was taken in relation to some of the matters mentioned, yet in pursuing the broad inquiry, whether a fair trial was had, we feel at liberty to examine the record as a whole without regard to objections.

"The term 'fair trial' is often used, but not often defined. It is of broad scope. While we shall not undertake to give a formal definition of the term, yet it may not be amiss to mention, in part at least, its content. It means a trial conducted in all material things in substantial conformity to law. *People v. Wolf*, 183 N.Y. 464, 76 N.E. 592; *Nichols v. State*, 10 Okl. Cr. 12, 133 P. 256.

"It consists not only in an observance of the naked forms of law, but in a recognition and just appreciation of its principles. *State v. Pryor*, 67 Wash. 216, 121 P. 56; *Eagan v. United States*, 287 F. 958, 971, 52 App. D. C. 384. It means a trial before an impartial judge, an impartial jury, and in an atmosphere of judicial calm. *State v. Weldon*, 91 S. C. 29, 74 S.E. 43, 39 L.R.A. (N.S.) 667, Ann. Cas. 1913E, 801; *State v. Gossett*, 117 S.C. 76, 108 S. E. 290, 16 A.L.R. 1299. Being impartial means being indifferent as between the parties. *Omaha & R.V.R. Co. v. Cook*, 37 Nev. 435, 55 N.W. 943. It means that the acts and

language of the prosecuting attorney are subject to control; that his duty consists, not in securing conviction at all hazards, but in ascertaining the truth. *Nichols v. State, supra; People v. Wolf, supra, People v. Gotshall,* 23 Mich. 474, 82 N.W. 274; *Wilson v. State,* 87 Nev. 638, 128 N.W. 38. It means that the defendant shall have a fair opportunity through his counsel to outline his defense to the jury. It means that the right of cross-examination shall be respected. *Gallaghan v. United States, supra; Svarney v. United States,* supra; *People v. Brady,* 56 Cal. App. 777, 206 P. 668. It means that, while the judge may and should direct and control the proceedings, and may exercise his right to comment on the evidence, yet he may not extend his activities so far as to become in effect either an assisting prosecutor or a thirteenth juror. *Wearve v. United States,* supra; *Rudd v. United States,* supra; *Parker v. United States,* supra. It means that, if evidence of good character of the defendant is introduced, an adequate instruction to the jury shall be given touching the probative value of such evidence.

"When the record in the case at bar is viewed in the light of the foregoing principles, we think it clearly discloses that the defendants did not have the fair and impartial trial to which they were entitled."

We have attached hereto in the appendix excerpts from the record concerning the prosecutor becoming distraught and some of her remarks, which could have only been prejudicial.

Summing up the entire atmosphere created by this witness, with such a wretched background, telling three different stories, two of which were under oath, the incidents regarding the threat by the Assistant United States Attorney so distracted the attention of the jury that we believe no conclusion could be reached, but that the jury was highly prejudiced by this situation, denying to this petitioner a fair trial as guaranteed by the Constitution and the many authorities interpreting the same.

Conclusion.

We respectfully urge that the petitioner has authority and justice on his side, and this Court should grant Certiorari to the end that the Judgment of the District Court and of the Circuit Court of Appeals be reversed.

Respectfully submitted,

RUSSELL E. PARSONS and
IRVING D. APPLE,

By RUSSELL E. PARSONS,

Attorneys for Petitioner, Louis P. Hattem.

APPENDIX I.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Louis P. Hattem, Appellant, vs. United States of America, Appellee. No. 16,467.

Oct. 11, 1960.

On Appeal from the United States District Court for the Southern District of California Central Division.

Before: Barnes, Jertberg and Koelsch, Circuit Judges

Koelsch, Circuit Judge:

Appellant was found guilty by a jury verdict of two counts of acquiring or otherwise obtaining marihuana without having paid a transfer tax in violation of 26 U.S.C.A. §4744(a). The first count charged that he "knowingly and unlawfully acquired and obtained" six marihuana cigarettes on June 10, 1958; the second, in identical language, charged him with the acquisition of two such cigarettes on the same day. He was sentenced to five years imprisonment on each count, the sentences to run concurrently. We have jurisdiction under 28 U.S.C.A. §1291.

The principal question presented is whether the evidence establishes the defense of entrapment as a matter of law.

The pertinent facts show that appellant was arrested in Los Angeles on June 10, 1958 in the apartment of one Kathleen Briggs, a seventeen-year old girl who was then acting as an agent for the Los Angeles Police. Miss Briggs, later Mrs. Wolfe following her mar-

riage before the trial had been in trouble in 1957 because of her association with young men who had used marihuana; she was never prosecuted in that connection but did testify against them in 1957 at a state trial involving marihuana and was thereafter released in her mother's custody. She first met appellant in November or December 1957 and saw him occasionally at various nightclubs throughout the spring of 1958.

In May 1958, after Kathleen returned from a trip to Las Vegas with her future husband, Lynn Wolfe, and another woman, Wolfe discovered a package of marihuana in Kathleen's purse. She agreed to phone Alfred C. Allen, a police officer assigned to the Juvenile Narcotics Unit, whom she had met during her previous troubles. She testified that she first told Allen "a big wild story" as to where she obtained the marihuana, but finally told him she was ready "to tell the truth" and gave him appellant's name as the person who provided her with the package; she was taken into custody and made a ward of the Juvenile Court.

Officer Allen then investigated the appellant and discovered he had a criminal record: he had been convicted in 1954 by a California State Court of unlawfully possessing one marihuana cigarette and again in 1955 by a federal court for illegally importing a quantity of marihuana into the United States. Allen obtained permission from Juvenile Court to have Miss Briggs released in his custody for the purpose of apprehending appellant in the sale of narcotics; to accomplish this a concealed microphone was placed in Kathleen's apartment at the Chancellor Hotel and through the cooperation of Wolfe, who owned the hotel, a tape recording machine was connected to the microphone by a wire and

installed in the adjacent room. Kathleen was then instructed by the police to call appellant and arrange for a sale or delivery of marihuana to her.

The record does not show how Kathleen first contacted appellant, but he came to her apartment on May 29, 1958. The testimony is conflicting as to what was said at this meeting (it was not fully recorded): police officers testified that they overheard appellant say he knew persons who had several "kilos" of marihuana and that he himself had a "can" which was promised to someone else; appellant, however, testified that he informed Kathleen that he was not interested in her request, that he was not a seller of marihuana, and that she should try elsewhere; but he did admit informing her that if she had no success in obtaining the marihuana, he would look into it after he returned from a forthcoming trip to Lake Mead.

Kathleen attempted to reach appellant many times after this meeting and testified that she may have tried to call him by telephone as many as twenty-five or thirty times, but that she actually was able to reach him only about twice. One conversation did occur on June 3rd, and again the testimony is conflicting as to what appellant said. Officer Allen, who listened in on this phone call, testified that appellant stated he could not find his "connection" from whom he could obtain marihuana, but hoped to soon, and if he did, he would bring some over; appellant said that he informed Kathleen he wanted nothing to do with marihuana and that he again had advised her to obtain it elsewhere.

On June 9, 1958 appellant phoned Kathleen; she again importuned him to obtain some marihuana for her and invited him over to her apartment for breakfast

the next morning; he again testified, however, that he became angry, disclaimed any interest in procuring marihuana for her, and told her to stop calling him. Nevertheless, he did obtain marihuana in a bar on Sunset Boulevard, Hollywood, later in the same evening and did visit Kathleen the next morning. Appellant admitted that he brought a quantity of marihuana with him and that he then rolled this into six cigarettes; he also admitted smoking one while there and handing two to Kathleen. She then handed appellant $5.00 which she said was payment for a previous delivery of marihuana, but he testified that he never sold her any and that the $5.00, which was later taken from his possession by the police, was payment for a prior loan; she also offered appellant $2.00 for the two cigarettes he had just given her, but he refused to accept any payment for them. Kathleen testified that appellant remarked that he had smoked twelve marihuana cigarettes the evening before, which he denied, and that he also stated he "couldn't live without it." Shortly afterwards the officers entered the room and arrested appellant.[1]

The defense of entrapment has been recognized since the decision of the Supreme Court in Sorrells v. United States, 287 U.S. 435 (1932). While there has been a

[1]We find it unnecessary to consider the evidence relating to Count II; that evidence contains conflicting testimony concerning the government's search of appellant's car after his arrest wherein the two marihuana cigarettes mentioned in Count II were seized. The defense of entrapment appears equally relevant to both counts, and if sustained, both counts must fall; if not sustained, both should stand. Even if the conviction under Count II were reversed, however, appellant was given concurrent five year sentences on each count, so that if the conviction as to Count I is affirmed, the judgment and sentence must be affirmed. Roviaro v. United States, 353 U.S. 53 (1957); Chin Bick Wah v. United States, 245 F. 2d 274 (9th Cir. 1957).

continuing disagreement concerning what the law should be on the subject,[2] there is little doubt at the present time concerning what the law is. In Sherman v. United States, 356 U.S. 369, 372 (1957), the Court described the evil of entrapment, quoting from Sorrells, as follows: "... the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." The Court then set down the guiding principles to be followed:

> "... the fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the *creative* activity' of law-enforcement officials ... To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal'... On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an 'appropriate and searching inquiry into his own conduct and predisposition' as bearing on his claim of innocence." [356 U.S. at 372-3].

The function of the trial judge generally is to determine whether entrapment has or has not been established as a matter of law; but if the question depends upon credibility factors or inferences drawn from

---

[2]See Mr. Justice Roberts' concurring opinion in Sorrells v. United States, 287 U.S. at 453, and Mr. Justice Frankfurter's concurring opinion in Sherman v. United States, 356 U.S. at 378.

conflicting evidence, it presents a question of fact which must be submitted to the jury. Sherman v. United States, supra, at 377; see also, United States v. Wallace, 269 F. 2d 394 (3rd Cir. 1959); Bruno v. United States, 259 F. 2d 8 (9th Cir. 1958); Annot., 33 A.L.R. 2d 883, 902. In the present case, the district judge did not find entrapment as a matter of law, but he did submit that issue to the jury under proper instructions.

We think his ruling was correct. The testimony and other evidence adduced at the trial tends to show on the one hand that appellant was not only a "user" and had been convicted twice before of possessing marihuana, but that he appeared to be still actively engaged in acquiring it and was in contact with his sources of supply; in short, he appeared predisposed to illegally obtain and acquire marihuana on his own initiative. On the other hand, appellant's testimony tends to show that he was a marihuana addict attempting to rid himself of the habit and tried in vain to resist the persistent pleas of Kathleen Briggs, acting as agent for the government and under their direction, until he finally gave in at her behest; in short, his disposition to obtain marihuana was "implanted" by the government through Kathleen, and but for her persuasion he would not have done so.

Under these circumstances, we cannot say as a matter of law that entrapment has been established. There are two substantially different versions of what occurred; their verity depends upon the credibility reso-

lutions made and inferences drawn from conflicting evidence. See Roth v. United States, 270 F. 2d 655 (8th Cir. 1959). As such, the issue was a proper one for the jury.[3]

Appellant relies on Sherman v. United States, supra, where entrapment was found as a matter of law. That case is readily distinguishable from this one; there it was undisputed that the government agent sought by continuous appeals to his sympathy to induce the defendant, who was then taking a cure for narcotics addiction, to obtain a source of narcotics for the agent; he succeeded in convincing the defendant to return to the habit as well. Here we are not faced with even an analogous situation unless appellant's testimony is believed, and the government's ignored, completely; such resolutions, under the Sherman case, are for the jury.

Further, it is significant that in Sherman, the defendant was convicted for selling narcotics under 21 U.S.C.A. §174; the sale and profits therefrom were the criminal germs implanted in the mind of the defendant by the government. Not so here. Appellant was convicted only of "obtaining" marihuana, and it is far from clear that this acquisition was borne out of Kathleen's request for the narcotic. For example, the

---

[3]It is noteworthy that as a matter of substance, this conclusion is apparently in accord with the present minority view of the Supreme Court (see note 2, supra). The difference is that while the minority would agree with the majority, for somewhat different reasons, that entrapment was not established as a matter of law, the case would be remanded to the trial judge for his determination, which would be final. See Mr. Justice Frankfurter's dissenting opinion in Masciale v. United States, 356 U.S. at 389.

fact that he admitted giving her only two of the six marihuana cigarettes, asked her to smoke one with him, and though she declined, smoked it himself anyway, demonstrates that his acquisition was not solely for her benefit alone. Of course, the government cannot avoid entrapment merely by charging the defendant with acquiring or obtaining rather than with selling marihuana, but the facts presented here tend to show that appellant, while perhaps not a seller, was not unfavorably disposed to acquiring marihuana for his own use.

We are more inclined to think that this case is controlled by Masciale v. United States, 356 U.S. 386 (1958), decided the same day as Sherman, where the Court found that the testimony on the issue of entrapment was conflicting and therefore properly submitted to the jury. We conclude, as the Court did there, that "[w]hile petitioner presented enough evidence for the jury to consider, they were entitled to disbelieve him . . . and so find for the Government on the issue of guilt." 356 U.S. at 388.

Appellant does urge a second point, namely, that he was denied a fair trial. However, we find no merit to this contention because none of the facts recited in support of it, either individually or collectively, scratch the surface of what are constitutionally recognized as the procedural or substantive safeguards of a fair trial; nor have we found any in our search of the record.

In support of this contention, however, he urges the fact that Kathleen recanted a portion of her direct testimony; he stresses that on cross-examination she stated that she did not obtain the marihuana found by Lynn Wolfe in her purse on May 27, 1958 from

the appellant, but rather acquired it while in Las Vegas through one Frank Assunto, who made arrangements there for her to obtain it from a friend; in addition he points out that she also testified on cross-examination that she had been threatened with "jail" by government counsel. But this appellant is apparently urging that Kathleen was compelled to testify falsely as to where she obtained this marihuana.

Government counsel was permitted to impeach Kathleen as an adverse witness because of this surprise testimony; this was accomplished by introducing her testimony from another proceeding in which she stated unequivocally that she had asked for and received the package of marihuana from the appellant before leaving for Las Vegas. Further, she admitted that the purported "threat" by government counsel was made one week before the trial began and consisted of the single statement that "[t]hey put pregnant women in jail also." Thus, it is not only doubtful that her changed testimony was itself truthful, but the statement ascribed to government counsel, if made at all, appears wholly insufficient to constitute a real threat designed to coerce particular false testimony.

Appellant does not, and indeed could not, contend that he was convicted on Kathleen's perjured or false testimony. The question of whether she had previously testified falsely was for the jury, and the district judge submitted the issue to them under the following instruction:

> If you find that any witness in this trial has wilfully testified falsely as to any material fact in the case, then you are at liberty wholly to disregard all of the testimony of that witness, if you

> consider it to be wholly unworthy of credence. However, you are not obliged to so disregard all of the testimony of such witness and should not do so if, and to the extent that, in your opinion any part or parts of such testimony be worthy of belief.

This instruction was a correct statement of the law and afforded appellant the opportunity to have the question fairly determined by the jury. See Shelton v. United States, 169 F. 2d 665 (D.C. Cir. 1948); Mason v. United States, 95 F. 2d 612 (5th Cir. 1938).

Moreover, there was other testimony directly bearing on this question: Officer Allen corroborated Kathleen's earlier testimony that she told him she had received the marihuana from appellant, and Frank Assunto unequivocally denied that he arranged for a delivery of marihuana to Kathleen from a friend in Las Vegas. It is significant also that Kathleen did not at any time recant the other, and major, portions of her previous testimony. Thus, there is serious doubt whether her initial testimony was false at all, and the jury was entitled, on the evidence before us, to accept or reject that testimony. Whether accepted or rejected, the evidence was sufficient to go to the jury on the question of entrapment without prejudicing appellant's right to a fair trial.

Affirmed.

(Endorsed) Opinion Filed Oct. 11, 1960. Frank H. Schmid, Clerk.

APPENDIX II.

Excerpts From the Record Concerning the Prosecutor Becoming Distraught:

Q. (By Mr. Parsons): Now, Mrs. Wolfe (Kathy Briggs), has anybody threatened you in connection with your testimony here? A. Yes.

Q. Who? A. Last Wednesday I went upstairs in the United States Attorney's Office and Mrs. Bulgrin stated that "They put pregnant women in jail, also."

Mr. Parsons: That is all.

The Court: There may be redirect examination.

Mrs. Bulgrin: I am sorry, your Honor. Please bear with me, your Honor.

This is a terrible thing. I will need a moment to compose myself.

Forgive me, ladies and gentlemen. I am sorry.

I think I had better sit down for a minute, your Honor.

The Court: All right.

Mrs. Bulgrin: I am very disappointed.

Mr. Parsons: Would your Honor care to declare a recess?

Mrs. Bulgrin: I will be all right, Mr. Parsons, in just a moment. I am sorry. I am just disappointed to have to—

I don't think it is particularly appropriate for me to get upset, your Honor, but this has been a very difficult trial. I am sorry. [Rep. Tr. pp. 404-405].

Redirect Examination of Kathy Briggs:

By Mrs. Bulgrin:

Q. And the statement that I allegedly made to you was that, "They put pregnant women in jail"?

A. "Also."

Q. The word "also"? A. Or "too" yes.

Q. There is absolutely no mistake in your mind as to that statement, is that right? A. That is right. I wouldn't have said anything about it if it hadn't been said.

Q. You realize at the present time, Mrs. Wolfe, you are testifying under oath, even though you have not been sworn today, is that correct? A. Yes, ma'am.

Mr. Parsons: To which I object to such a question.

The Court: I shall allow the question to stand and the answer to stand, in the light of this colloquy.

Mrs. Bulgrin: I am sorry. My memory isn't functioning right now. [Rep. Tr. p. 408.]

* * * * *

Q. By Mrs. Bulgrin: Now, you have been married to Mr. Wolfe since August of 1958, isn't that right, Mrs. Wolfe? A. Yes.

Q. As a matter of fact, during that time your husband has seen a great deal of Mr. Apple, who is associated with counsel for the defendant, both now and in the preceding matter with Mr. Hattem's attorneys, isn't that correct?

Mr. Parsons: To which we object, incompetent, irrelevant and immaterial. Further, your Honor, it now appears—I have said very little about this— she is now attempting to cross-examine her own witness.

Mrs. Bulgrin: I am sorry, sir—

Mr. Parsons: I realize the circumstances—

The Court: I should not repel the question in the circumstances on the ground that she is cross-examining her own witness. But I reject the question otherwise. It need not be answered. [Rep. Tr. pp. 411, 412.]

* * * * *

Q. By Mrs. Bulgrin: Now, Mrs. Wolfe, I will show you certain testimony which you gave in the prior proceedings in this case—

The Court: Now, I will strike that remark.

Mrs. Bulgrin: I am sorry.

The Court: There have been no prior proceedings in this case. This case has never been tried before. There has been a trial involving this defendant, but I shall be at pains in the course of the charge to make clear this is not a retrial of that case.

Mrs. Bulgrin: I am sorry, your Honor. It was a slip of the tongue. I meant it in a loose way. I know the court has admonished the jury in the proper way. This is not a rehash of another proceeding. I am still, I guess, a little upset. I am sorry. [Rep. Tr. p. 414.]

FILE COPY

Office-Supreme Court, U.S.
FILED
JAN 18 1961
JAMES R. BROWNING, Clerk

No. 592

In the Supreme Court of the United States

OCTOBER TERM, 1960

LOUIS P. HATTEM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM RICHARD WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys,
Department of Justice,
Washington 25, D.C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	8
Conclusion	10

CITATIONS

Cases:

Costello v. *United States*, 255 F. 2d 389, certiorari denied, 358 U.S. 830 10

Hirabayashi v. *United States*, 320 U.S. 81 9

Lawn v. *United States*, 355 U.S. 339 9

Masciale v. *United States*, 356 U.S. 386 8

Poliafico v. *United States*, 237 F. 2d 97, certiorari denied, 352 U.S. 1025 10

Sherman v. *United States*, 356 U.S. 369 8

Statute:

26 U.S. 4744 2

580697—61

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 592

LOUIS P. HATTEM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. IX,[1] 3–10; Pet. App. I, 1–10) is reported at 283 F. 2d 339.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1960 (R. IX, 11). A petition for rehearing was denied on November 21, 1960 (R. IX, 12). The petition for a writ of certiorari was filed on December 20, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The record is in nine volumes which are referred to by their Roman numerals.

QUESTIONS PRESENTED

1. Whether the issue as to petitioner's entrapment was properly submitted to the jury.

2. Whether the petitioner was denied a fair trial because of a partial recantation of a government witness' testimony and an alleged pre-trial threat by the prosecutor against this witness.

STATUTE INVOLVED

26 U.S.C. 4744 provides:

> (a) *Persons in general.*
>
> It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741 (a)—
>
> (1) to acquire or otherwise obtain any marihuana without having paid such tax, or
>
> (2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.
>
> Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a).

STATEMENT

Petitioner was charged in count 1 of an indictment returned in the Southern District of California with the unlawful acquisition of six marihuana cigarettes on June 10, 1958, without having paid the tax thereon, in violation of 26 U.S.C. 4744(a)(1), *supra*

(R. I, 1). Count 2 charged a similar offense as to two additional marihuana cigarettes on the same date (R. I, 2). The jury found petitioner guilty on both counts, and he was given concurrent sentences of imprisonment for five years and a $1,000 fine on each count (R. I, 66, 83). On appeal (R. I, 85–86), the conviction was affirmed (R. IX, 11).

Evidence adduced at the trial may be summarized as follows:

1. Petitioner first met Miss Kathleen Briggs[2] in Hollywood, California, in November 1957, and saw her at various night clubs during the spring of 1958 (R. IV, 270; R. V, 450, 451). Narcotics officer Allen of the Los Angeles police first met Miss Briggs in September 1957, and shortly thereafter she testified as a witness against some young men involved in a narcotics transaction (R. II, 20, 55–56).

On May 27, 1958, after their return from a trip to Las Vegas, Mr. Wolfe, Miss Briggs' future husband, found in her purse a paper tube about 8 inches long containing marihuana, and insisted that she call the police about it (R. V, 381–383). She called officer Allen, who took her into custody after which she was made a ward of the Juvenile Court (R. V, 383; R. II, 21–22, 57).[3] Miss Briggs testified that at first she gave the officers a "big wild story" about obtaining the marihuana from a fictitious "Johnny," but later

[2] On August 22, 1958, Miss Briggs married one Wolfe, a witness at the trial (R. IV, 281), but we shall refer to her as Miss Briggs.

[3] Miss Briggs was only 17 years old at the time of the trial (R. IV, 288).

decided to tell the truth and pointed to the petitioner's name in her address book (R. IV, 296, 298–298A). Upon investigation, officer Allen learned that petitioner had been convicted on a federal charge of transporting 5½ pounds of marihuana across the Mexican border in 1955, and on a state narcotics charge in 1953 or 1954 (R. II, 89, 91). Allen arranged with the Juvenile Court to have Miss Briggs released to his custody (R. II, 59–60). Wolfe, the owner of the Chancellor Hotel, where Miss Briggs lived, and Miss Briggs agreed that the officers should set up a tape recording device and microphone to be hidden in her apartment so that the police in Wolfe's adjoining apartment could listen in on conversations (R. V, 377, 388–389; R. II, 61–62). Allen told Miss Briggs to telephone the petitioner to ask that he get some marihuana for her (R. II, 65–67).

A conversation, only the last part of which was recorded, took place between Miss Briggs and petitioner at her apartment on May 29, 1958 (R. II, 26–27).[1] The officers overheard petitioner say that on the previous night he had met a person who had some kilos of marihuana, that he was going to obtain several pounds, and that when he returned from a trip to Lake Mead he would give her some. She asked if he had any at that time, to which he responded that he had a "can" already promised to someone else (R. II, 26, 32; R. III, 159–160). As to this conversation, petitioner testified that he told Miss Briggs he was not interested since he was not a marihuana

[1] The agent testified that the first part was not recorded because petitioner had arrived before the agents (R. II, 28).

pusher, but that if she could not obtain marihuana from someone else, he would look into the matter when he returned from Lake Mead (R. V, 454–455).

Between June 2 and June 10, 1958, Miss Briggs made about 25 or 30 telephone calls to the petitioner, but reached him only a "couple of times" (R. III, 263; R. IV, 267). Officer Allen testified that, in a conversation on June 3, petitioner told Miss Briggs that he had been unable to locate his "connection," but that if he did meet him that night he would come over with some marihuana (R. II, 80). Petitioner testified that in that conversation he told Miss Briggs that his previous story about the kilos of marihuana was "apparently a myth," that he could find no marihuana, and that she should talk to someone else about it (R. V, 460–461). The police officers testified that they did not hear any statement by petitioner about the previous story being a myth (R. II, 95–96; R. III, 192).

On June 9, 1958, petitioner telephoned Miss Briggs, who asked that he obtain some marihuana for her and invited him over for breakfast the next morning (R. III, 250–251). Petitioner testified that he became angry at her for asking for marihuana, told her that he could not get any, and that she should stop calling him about it (R. V, 463–464). Nevertheless, petitioner did obtain some marihuana that night at a bar in Hollywood and brought it to Miss Briggs' apartment the next day, June 10 (R. V, 465; R. III, 238–239).[4] Petitioner admitted in his testimony

[4] The tape recording of the conversation of June 10 was audibly reproduced before the jury (R. IV, 320–321, 335).

that, after arriving at the apartment he rolled six marihuana cigarettes, and smoked one of them in the bathroom (R. VI, 471–472A). He gave two cigarettes to Miss Briggs, and asked her to smoke with him but she refused (R. III, 232, 233). He testified that she handed him $5.00, which she said she owed him for a previous marihuana delivery. He denied ever having made a sale and refused the money, although admitting that he had previously loaned her $5.00. He also refused $2.00 offered for the two cigarettes he had given her (R. VI, 472–A, 473). Miss Briggs testified that the petitioner mentioned that he had smoked twelve marihuana cigarettes the night before and that he could not give up the habit because it was "his life" (R. III, 238, 241). Petitioner denied stating that he had smoked twelve marihuana cigarettes the previous night (R. VI, 481–482).[6] Shortly after these events, the officers entered the apartment, arrested petitioner, and seized the six marihuana cigarettes which formed the basis for count I (R. II, 40–41).

Petitioner at first told the officers that he had come to the apartment in a taxicab, but then admitted that he had driven there in his mother's Cadillac, which the officers had seen when he arrived (R. VI, 476, 508). The officers searched the Cadillac and found one marihuana cigarette in an ashtray and another under the rear seat, these two cigarettes constituting the basis for count II (R. II, 50–51; R. III, 163–164, 199–200; R. VI, 501, 509).

The marihuana cigarettes were introduced in evi-

[6] Petitioner admitted that he had been a user of marihuana as far back as 1948 (R. VI, 490).

dence (R. II, 53; R. III, 152–155, 219–222). There was evidence that petitioner was given a demand notice to produce the required order form for transfer of the marihuana, but he did not produce it (R. IV, 302–306).

2. On cross-examination Miss Briggs testified that about a week before the trial, while she was in a room with the prosecutor, Mrs. Bulgrin, and narcotics agent Goven, the prosecutor threatened her by saying, "They put pregnant women in jail, also" (R. V, 404, 406).[7] Agent Goven testified in rebuttal that he did not recall that this remark had been made (R. VI, 519).

Miss Briggs originally testified that she had obtained from the petitioner the marihuana found in her purse on May 27, 1958. However, on redirect examination she stated that she had obtained it in Las Vegas from a friend of Frank Assunto, whose name she did not remember (R. V, 428–429). In rebuttal, Assunto testified that, although he had seen Miss Briggs in Las Vegas, he did not have any conversation with her about marihuana, give her any, or see any in her possession (R. VI, 525). The prosecutor was also permitted to read Miss Briggs' sworn testimony in a prior proceeding that she had asked for and received the package of marihuana from the petitioner on May 22, 1958, before leaving for Las Vegas (R. V, 414–425).

[7] Miss Briggs was pregnant by a man other than her husband at the time of the trial (R. IV, 282).

ARGUMENT

1. Contrary to petitioner's contention (Pet. 10–15), there was no entrapment as a matter of law. The evidence was conflicting as to whether the crime was "'the product of the *creative* activity' of law-enforcement officials," or whether the "government agents 'merely afford[ed] opportunities or facilities for the commission of the offense * * *'" (*Sherman* v. *United States,* 356 U.S. 369, 372, emphasis in original). See the Statement, *supra,* pp. 3–6; Pet. App. I, 6. In these circumstances, the question of entrapment was properly submitted to the jury. *Masciale* v. *United States,* 356 U.S. 386. *Sherman* v. *United States, supra,* is distinguishable, since there this Court was "not choosing between conflicting witnesses, nor judging credibility" but reached its "conclusion from the undisputed testimony of the prosecution's witnesses" (356 U.S. at 373).

The evidence justified the jury's conclusion that petitioner had not been entrapped. Even though Miss Briggs admitted that she telephoned petitioner 25 or 30 times, it is significant that she reached him only a few times before the date of the arrest; there was no constant, unrelenting importunity. The petitioner's predisposition to commit the offense of illegal acquisition of marihuana, without the need for a government agent to implant the original idea in his mind, was shown by his two previous convictions for narcotics offenses; by his admitted use of marihuana as far back as 1948; by his statement that the marihuana habit was "his life"; and by his admission to Miss Briggs that he had smoked twelve marihuana cigarettes the night before his arrest.

Moreover, the two marihuana cigarettes in the Cadillac were apparently not intended for Miss Briggs, since petitioner did not bring them into the apartment with the marihuana involved in Count 1. The inference is that he obtained them for his own use, not as the result of any alleged entrapment by Miss Briggs. Since the sentences on the two counts were concurrent, the conviction may be upheld on either count. See *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Lawn* v. *United States*, 355 U.S. 339, 359.

Since there was sufficient evidence for the jury on the issue of entrapment, and the charge on that issue was fair and complete, petitioner has no cause for complaint. Nor does he have the right to complain of the way in which the narcotic agents allegedly treated Miss Briggs. Of course, the fact that the evidence of non-entrapment was sufficient and that petitioner cannot complain of Miss Briggs' treatment does not mean that we approve of the way in which she was allegedly treated.

2. There is no merit to petitioner's contention that he was denied a fair trial by reason of Miss Briggs' recantation of her testimony as to the person from whom she received the marihuana found in her purse on May 27, 1958, and the alleged threat of the prosecutor to put her in jail (Pet. 15–19). The facts regarding this are set out in the Statement, *supra*, p. 7. As the court below correctly pointed out in appraising the record, none of the facts relied upon even "scratch the surface of what are constitutionally recognized as the procedural or substantive safeguards of a fair trial" (Pet. App. I, 8).

In view of the fact that Miss Briggs changed her testimony that she had obtained from the petitioner the marihuana found in her purse on May 27, 1958, to a statement that she had obtained it in Las Vegas from a friend of Frank Assunto, the government was properly permitted to show that her original testimony was in accordance with her testimony in a prior proceeding. Cf. *Poliafico* v. *United States*, 237 F. 2d 97, 108–109 (C.A. 6), certiorari denied, 352 U.S. 1025; *Costello* v. *United States*, 255 F. 2d 389, 396–397 (C.A. 8), certiorari denied, 358 U.S. 830. The question whether Miss Briggs obtained the marihuana found in her purse from the petitioner or from a friend of Assunto was not, however, the issue in the case; the conviction was based upon different marihuana which petitioner had acquired the night before his arrest. The alleged threat was supported only by Miss Briggs' testimony to such effect late in the trial. The agent who was present did not recall any remark by the prosecutor about putting pregnant women in jail.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

JANUARY 1961.

U. S. GOVERNMENT PRINTING OFFICE: 1961